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International Review

INTERNATIONAL REVIEW

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I. INTERNATIONAL CIVIL AVIATION ORGANIZATION

11th SESSION OF THE ASSEMBLY OF ICAO, MONTREAL, MAY 20-JUNE 2, 1958

The 11th Session of the Assembly of the International Civil Aviation Organization was held at the Montreal Headquarters of the Association between May 20 and June 2, 1958.

Mr. H. E. Toru Hagiwara, Ambassador of Japan to Canada, was elected President of the Assembly. Mr. Hagiwara also presided over the Assembly's Executive Committee.

Mr. Alan Hepburn, Australian Representative on the ICAO Council, was elected Chairman of the Administrative Committee.

Representatives of 52 Member States, two non-Member States and three international organizations took part in the work of the Assembly.

A net budge of $3,672,000 (Canadian) to carry on the work of ICAO in 1959 was voted by the meeting, as compared with the figure of $3,310,800 voted by the previous Assembly for the year 1958.

Other actions taken by the Assembly include the following:

Implementation Panel

The Assembly provided funds to allow the ICAO Implementation Panel to complete its work; the period involved is expected to continue through 1958 and, if necessary, into the first months of next year. The Panel was set up by the ICAO Council to study the provision of air navigation facilities and services throughout the world and to consider what improvements in these will be necessary during the transition period when turbo-jet aircraft are being introduced on the world's air routes.

Limitation on Contributions

The Assembly decided in principle that the contribution of any one member state should not exceed 30% of the total contributions assessed in behalf of the ICAO budget. It therefore agreed to make a small reduction in the 1959 contribution of the United States of America, which now pays one-third of the total ICAO budget, and to leave to the next session of the Assembly the decision by which this principle may be further implemented, as well as requesting Council to study the assessment system.

A SUMMARY OF THE ICAO STUDY—"THE ECONOMIC IMPLICATIONS OF THE INTRODUCTION INTO SERVICE OF LONG-RANGE JET AIRCRAFT"*

The International Civil Aviation Organization has just released a study entitled "The Economic Implications of the Introduction into Service of Long-Range Jet Aircraft." This study was prepared by the ICAO secretariat, and was considered and revised by the ICAO Air Transport Committee. It has been released under the direction of the Council of ICAO, although the Council has not adopted or endorsed any of the views or conclusions contained in the study.

The study is an attempt to assess what appear to be the main economic implications of the introduction into service of the long-range turbo-jet airliners that are now on order in large numbers. First, the changing nature of the world's scheduled airline fleets is described, particularly the change-over to turbine power, and the general increase in size, speed, capacity, and price of the aircraft due to come into use in the next few years. Next, the differential characteristics of the larger jets are dealt with. In a number of important respects—particularly their weight, capacity, and price—they are outside the normal trends within which the other aircraft on order fall. Attention is then given to some general economic factors, such as the effects of recessions on the air transport industry, forecasts of supply of and demand for air transport productive capacity and the stage and traffic patterns of international air services. Finally the economic implications of the new aircraft for operators, users, and governments are examined.

Although the study is based on available information, it is admitted to be unavoidably to some extent theoretical and speculative. It deals with the air transport industry as a whole, on a world-wide basis, but excludes the relatively small sector of purely non-scheduled operators and those of the USSR and the People's Republic of China. Under these terms of reference any interchange of aircraft among operators does not change the overall picture, nor does it alter the total number of aircraft available for service within this sector. The exceptions are aircraft that are either put out of commission or sold to non-scheduled operators.

The study considers all civil transport aircraft of over 20,000 pounds maximum take-off weight, and covers the period from 1958 to the end of 1961. It sets out the present trend in the air transport industry towards turbine powered aircraft. Of the 1006 aircraft ordered up to April 1958 for delivery before the beginning of 1961, 86% will be powered by turbine engines and only 14% by piston engines. The proportion of turbine engined aircraft in the world's fleet will rise from 6% at the end of 1957 to an estimated 22% at the end of 1961.

Other aspects of the changing situation are the large increases in potential productivity. One of the new long-range turbo-jets is approximately equivalent to three of the latest piston-engined types, or to twenty DC-3's, in terms of capacity tonne-kilometres per hour. The Boeing 707, the Douglas

* By Roderick Heitmeyer, IATA Economics and Statistics Officer.

DC8, the Convair 880 and the Boeing 720, will all be capable of producing over 7,300 tonne-kilometres of air transportation per hour. It is estimated that by 1960, even when no allowance is made for disposals of piston-engined aircraft, approximately 22% of the potential production capacity of the world's air transport fleet will be offered in these four aircraft types representing only about 6% of the numerical total.

While turbo-prop aircraft fit into the general trend of development of aircraft characteristics that can be observed over the last ten years, turbo-jets represent a leap beyond this trend in many ways. Turbo-jet aircraft all fly faster and higher, are appreciably quieter and more comfortable inside, consume more fuel in relation to loads carried and distances flown, produce new heat and blast effects on the ground, and possess a novelty that will have a still unknown effect on their public appeal. There are, however, additional characteristics by which the larger turbo-jets may be distinguished from the others. These are their weight, runway requirements, purchase price, and their potential productive capacity. The two long-range turbo-jets—the Boeing 707 and the DC8—are about 50% heavier, require appreciably longer and stronger runways, and are about 50% more expensive to purchase than any other aircraft now in operation or on order. However, as a result of their high productivity the capital cost of the long-range jets, although high in absolute terms, is less per unit of production than that of the latest long-range piston-engined aircraft.

What the exact unit operating costs of turbine powered aircraft are, is inevitably unknown except in theory. Much has been written on the comparative operating cost of turbo-jets and turbo-props, but in many cases the opinions expressed are contradictory and the estimates provided not comparable. It would appear that this question will not be settled finally until a certain amount of operational experience has been gained. The study does however tentatively conclude that on suitable stage-lengths the unit operating costs of turbine powered aircraft will be, in general, somewhat lower than those of piston-engined types. It is also expected that some of the new aircraft will have lower "break-even" load factors than current types when operated over suitable stage lengths, but again it was not possible to forecast what these may turn out to be on the average in practice.

Future Demand Versus Capacity

Any consideration of the future of air transport involves the possibility of economic recessions, either relatively mild in scope or of a serious and world-wide nature such as occurred in the early 1930's. Insofar as the first type is concerned the evidence suggests that air transport is still in the stage of development where it tends to expand from year to year with relative immunity to minor changes in the general level of economic activity. It is probable, however, that this degree of immunity will tend to decrease, particularly as the ratio of pleasure to business travel increases. A world-wide and serious depression would present an altogether different picture and there is little doubt that the industry would be seriously affected.

Many attempts have been made to estimate the future demand for air transport, and almost as many different results have been obtained. There is a good deal of divergence of expert opinion on this matter. It would seem that quite apart from the possibility of economic recession there are too many unknown factors affecting the demand for air transport to permit forecasting more than a few years ahead with any degree of accuracy. The calculations made by ICAO of the future global demand for air transport have therefore been based on the simple projection, over the years 1958 to 1961, of the average increase from 1950 to 1957, namely an increase of 15% per year.

A different set of problems had to be faced when attempting to estimate

future global air transport production capacity. For one thing, the capacity that is actually offered in any given year is not necessarily the same as the total capacity in existence at that time. The capacity offered is, unless there is an absolute shortage of capacity, related to demand. Thus, if the total productive capacity at the disposal of the scheduled airlines is more than is required to meet the demand after all practical efforts have been made to obtain additional traffic, the excess will be disposed of either by selling aircraft to non-scheduled operators, by returning them to the manufacturers, by retiring them or otherwise. The study points out that any serious excess of total productive capacity over that required to satisfy demand could have an adverse effect on the air transport industry, since load factors may tend to fall before adequate steps have been taken to relate the capacity offered to the demand, and the process of disposing of surplus production capacity may be costly.

Since it is impossible to obtain any general world-wide picture of the operators' intentions with respect to their existing fleets, the study does not attempt to forecast what might be done with any aircraft that become surplus to airline requirements. The calculations of what ICAO calls "theoretical future productive capacity" are simply based on the estimated capacity of airline fleets at the end of 1957 (with a small allowance for attrition from accidents and other causes), and the capacity that would be added by the new aircraft due to be delivered from 1958 to 1961, assuming normal delays in putting them into service and normal rates of utilization thereafter. A comparison is then made of this total "theoretical productive capacity" with estimated future demand in order to show how much capacity the scheduled airlines would need to dispose of (in order to maintain present load factors) by selling aircraft to non-scheduled operators, by retiring them, or otherwise, or, alternatively, by what percentage total demand would need to be increased.

The study stresses that "the greatest caution must be observed in drawing conclusions from this calculation on a global scale. The following are the main assumptions on which it has been based, each of which contains a substantial margin of possible error:

(a) Average block speed for each aircraft type will equal mean cruise speed less 15%. (The actual block speed attained depends on many different factors and varies from one route to another.)

(b) Average payload capacity for each aircraft type will equal maximum payload less 20%. (The actual payload capacity varies from one flight to another and depends on the configuration of the aircraft, the weather, the ground facilities, the length of the flight and many other factors).

(c) Average daily aircraft utilization will be 8 hours for long-range jets and 7 hours for medium-range jets and for turbo-props. (In the first two years of the life of a new type of aircraft, the utilization is normally low but increases gradually as initial technical troubles are overcome and as experience is gained.)

(d) There will be no serious alteration in the present delivery schedules for the new aircraft coming into service from 1958 to 1961.

(e) Attrition resulting from accidents and other causes will reduce the existing fleet by about 2% per year. (Disposal of aircraft by retirement or sale to non-scheduled operators is not allowed for in the calculation of theoretical future productive capacity.)

(f) A load factor of 58.6% is taken as datum line. (Until more is known of operating costs of the new jets, it cannot be established that an actual load factor below 59% would be below the break-even factor.)

(g) Global demand for air transport (passengers, cargo and mail) will continue up to 1961 to increase at the 1950-1957 average growth rate of 15% per year."

On these assumptions, the calculations show a theoretical excess capacity each year, rising to over 2,400 million ton-miles in 1960, and falling to about 2,200 million ton-miles in 1961. It is estimated that the annual growth in capacity will rise above the assumed demand growth rate of 15% in 1958, with a growth of 22.2%, and in 1960 with a growth of 24.9%. The first of these increases reflects the main impact of the turbo-props on the world's fleet and the second, that of the new turbo-jets.

This calculation of excess capacity makes no allowance for the disposal of existing aircraft (other than 2% for attrition). The study assumes that the 1961 fleet will include 1393 DC-3's, 284 DC-4's, 160 C-46's as well as a number of other obsolete and obsolescent types. It expects, however, that a large number of these older types will have been scrapped by 1961.

The study also points out that the potential excess would not appear in practice, for instance, if 20% of the older piston-engined aircraft were disposed of. But it is expected that the disposal of some of the existing fleets will prove to be difficult.. A number of the aircraft of the older piston-engined types will have been fully or nearly fully depreciated and could be retired without seriously affecting the operating accounts of the airlines concerned. It is probable that many airlines will have planned their re-equipment programs on the assumption that they could realize some capital on their old aircraft, but the market for these aircraft appears to be limited. While international services account for only just over one-third of the total operations of the world's scheduled airlines, it seems likely that approximately two-thirds of the new long-range jet capacity will be available for these services. It is believed that after all possible transfers have been made from international to domestic operators a sizable surplus of capacity would still exist. The remaining possible market would lie with the non-scheduled airlines, whose operations do not amount in total to more than 10% of those of the scheduled airlines. Assuming that their operations are increasing at the same rate of 15% per annum, they can absorb a maximum of only about 1.5% of the scheduled operators' total productive capacity each year, even if they purchase no new equipment directly from the manufacturers. Even after these allowances are made the study estimates a theoretical surplus capacity for every year from 1958 to 1961, as follows—1958: 650 million ton-miles; 1959: 416 million ton-miles; 1960: 1,883 million ton-miles; 1961: 1,363 million ton-miles.

Route Patterns

Having examined the relationship between the supply and demand for air transport the study goes on to examine how the long-range jets will fit into the pattern of air services. It concludes that the international air service pattern is likely to be different in 1961, having a higher proportion of long stages, and of services with greater volume of traffic.

The long-range turbo-jet aircraft are generally agreed to be most suitable on routes where stage lengths are fairly long and where the volume of traffic is fairly high. They can still operate where stage lengths are shorter and traffic lighter, but less economically, or giving a less frequent service, until there comes a point where a particular stage can only be operated at a loss. These stages may still be operated, for example when they form a part of an otherwise suitable long route.

When the long-range jets are introduced it may be assumed that certain stops will be eliminated, either because refuelling is less frequently necessary or because the amount of traffic generated does not warrant the expense of landing and taking off. More reliance may be expected to be placed on feeder services. Airlines may also stagger their stopping schedules, and in some cases utilize the change of gauge technique. The resultant traffic pattern may consist of a number of short-stage stopping services, using the older types

of aircraft, along and across the main trunk routes feeding traffic to the jets at a few well separated points, with turbo-prop aircraft doing medium stage-length services and jets doing long stage-length services. It will, however, be some years before many parts of the international sector have developed enough traffic to support a complex service of this kind with satisfactory frequencies and load factors. This development may be accelerated in some cases, however, if governments extend the exchange of traffic rights.

Economic Implications for the Operators

The most striking feature of the transfer to jet powered aircraft is the high unit and total capital cost involved. The total value, without spares, of the aircraft on order for delivery by the end of 1961, both turbine and piston-engined, is approximately $3,000 million which is almost equal to the total list price value of the transport aircraft now in service in the world, calculated at about $3,100 million. Financing the purchase of such expensive equipment is already posing many serious problems.

The financial pressures may be expected to be felt most acutely by smaller airlines whose operations are not based on particularly high density routes. In some cases, where they are unable to afford the expensive new equipment they may be forced off the longer routes where the turbo-jets will have the greatest competitive advantage. This may give rise to an increase in such forms of inter-airline cooperation as pooling, chartering, and cooperative ownership and interchange of aircraft.

The competitive appeal of the jet will be based on speed and comfort. The economic significance of this appeal may not be so great in competition with surface transport, since the chief advantage of air transport—speed—is already so marked. The public appeal of the jet will be most significant in competition between airlines. It may be assumed that in general, where restrictions are not imposed, the competitive advantages of the jet will enable it rapidly to take traffic away from turbo-props and piston-engined aircraft operating on the same stages.

The public appeal may in some cases provide the operator with justification for demanding higher fares for jet transport. Where for various reasons turbo-jets are operated on medium or short distance routes and come into competition with other types of aircraft, an inter-airline agreement to establish differential fares to operate similar types of equipment on certain routes may be necessary.

The problem of attracting additional traffic will be a crucial one for the operators. The most effective way of achieving this is by the introduction of lower fares. It may also be necessary to increase selling expenses in the initial stages. The change-over to jet operations is also expected to raise training and maintenance costs, though the incidence of these items may be expected to decline as a result of the relative simplicity of the jet engine to operate and maintain. The effect of such additional costs in the early stages of jet operation may in fact influence airlines and governments in some cases not to favor reductions in fares and rates.

Passenger traffic falls broadly into two categories: business and pleasure. The former category is likely to be only slightly affected by changes in fares. Any large increase in passenger traffic must be sought in the pleasure category where cost is the most important consideration. But as the air transport industry comes to depend more and more on the pleasure traveller, the problem of "peak" demand periods will increase, and it may be that some of the older aircraft will be stored in serviceable condition for use at such times.

It seems probable that the operators in determining fare levels will be faced with a complex problem since the new aircraft types, although involving higher initial outlay, will be ultimately more attractive to the public and

cheaper to operate than the older piston-engined aircraft, which will still be in service on most routes for many years.

It is difficult to foresee with any certainty the effects of the introduction of the long-range jets on freight and non-scheduled operations. The availability of a considerable number of piston-engined aircraft at favorable prices may encourage their use on these types of operation. On the other hand, operators may employ long-range jet aircraft on freight and charter flights in an effort to utilize the greater productive capacity of these aircraft, which would again put them in competition with piston-engined aircraft. It is in any case probable that there will be a considerable increase in available capacity on these sectors in 1960 and 1961. This may lead to increased pressure from the operators concerned for a more liberal granting of operating rights, and to a reduction in frieght rates. The next few years are also likely to see a strong demand for improvements in ground handling facilities.

Economic Implications for Governments

The appearance and introduction of long-range jet aircraft will greatly accentuate the need for increased expenditure on airports and other air navigation facilities and services. They have in some cases also created particular needs that would not otherwise have arisen. Among these requirements are lengthened and strengthened runways, at least at certain "gateway" airports, a general increase in apron and hangar space, increased fuel storage facilities and faster refuelling devices, as well as modifications in airport design to reduce taxiing distances to a minimum. A considerable increase in expenditure will be necessary in respect of air navigation facilities and services, as a result of the steady increase in traffic density combined with the high speed, high fuel consumption (with consequent sensitivity to diversions and delays), high cruising altitudes, and more critical performance standards of the new turbo-jet aircraft.

From the facilitation point of view, the introduction of long-range jet aircraft with large loads will not only aggravate the present position, but will accentuate traffic peaks. This will call for extra efforts on the part of the managements of airports and the various government departments concerned to avoid serious congestion by ensuring rapid clearance.

The study points out that the steady increase in traffic, particularly tourist traffic, that is expected over the next few years should bring with it many economic benefits, direct and indirect, for the states receiving this traffic. The possibility exists, however, that this development may be retarded and the consequent benefits lost to certain areas should there be a lack of suitable accommodation. There are indications that tourist facilities are already becoming inadequate in some areas, and concern has been expressed about this situation by the ECAC, IATA, ITA, OEEC and UIOTO. ECAC, for instance, have recognized that the development of tourist traffic depends on, amongst other things, the existence of adequate facilities and accommodation for the air travellers, and has urged its Member States to take "necessary steps to ensure that there will be adequate hotel facilities to accommodate the increase in tourist traffic expected in the jet age."

Finally, the study suggests that governments may find it necessary to review certain aspects of their air transport policies in the light of the economic position of their carriers. Some of the matters that may require reconsideration are the extent to which the increased costs of airports and air navigation facilities should be passed on to airlines in the form of user charges; levels of taxation in view of the high costs of the new equipment and the sensitivity of jet operations to fuel prices; bilateral or multilateral agreements on the exchange of commercial rights; and the question of financial assistance to airlines, at least in the early phases of jet age, to keep

fares down in order to increase traffic. Governments may also be called upon to consider the desirability of contributing to technical assistance funds for the training of personnel to operate new air navigation facilities, and whether to participate in new joint financing schemes for the provision of air navigation facilities.

EUROPEAN CIVIL AVIATION CONFERENCE

The third session of the European Civil Aviation Conference (ECAC) will be held in Strasbourg, France, in the early part of 1959. The agenda is at present being established but indications are that the meeting, which groups the governments of Western Europe, will devote considerable attention to European charges and European route facilities' charges.

Other items on the agenda include: development of standard clauses in bilateral agreements; draft multilateral agreement on the technical aspects of interchange; draft multilateral agreement on certificates of airworthiness for imported aircraft; European cooperation in the basic flight training of personnel and of air navigation services ground personnel; simplified measures for the import and export of cargo, including special arrangements for shipments of low value and special arrangements for the rapid provision of import and export licenses or permits where these cannot be obtained immediately; and elimination of embarkation/disembarkation cards.

II. INTERNATIONAL AIR TRANSPORT ASSOCIATION

IATA TRAFFIC CONFERENCES, NASSAU, THE BAHAMAS MAY 19-20, 1958

The Composite and Joint Meetings of the IATA Traffic Conferences 1, 2 and 3 were held at Nassau on May 19-20, 1958.

A new technique has been introduced this year in order to break down the usual heavy agenda which these meetings have in the past tackled in the late summer. From now on, it is hoped that questions of procedure can be dealt with by the Spring Meeting, leaving to the Fall Meeting the questions of policy.

Certain IATA Traffic Resolutions, relating to such subjects as Conversion of Passenger Fares and Excess Baggage Rates, Rates of Exchange, Form of Passenger Ticket and Baggage Check, Tickets—Alterations to Flight Coupons, Voluntary Changes to Ticket, Form of Exchange Order, etc., have either been rescinded or revalidated and amended.

The Composite and Joint Meetings of the IATA Traffic Conferences are due to resume their discussions in Cannes on September 23, 1958, when the main questions on the agenda will pertain to Fares and Rates.

III. INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COMMERICAL ARBITRATION

The United Nations Conference on International Commercial Arbitration met in New York in May of this year.

The basic document for discussion was entitled the "Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards" which had been drawn up for the United Nations Economic and Social Council (ECOSOC) by a group of experts.

For some time, the most important international agreement on the subject was the Geneva Convention of 1927 which, when it was made, repre-

sented a great advance on existing procedure but it had become outmoded. However, the ICC, exercising its privilege as a Consultative Non-Governmental Organization, placed on the agenda of ECOSOC in 1953 a project for a new Convention. This was intended to serve as basis for the work of ECOSOC.

In its Special Number of the ICC News (Vol. XXIV, No. 3, April 1958), there appears an interesting account of the different methods of arbitration prevailing in various parts of the world.

Since the signing of the Geneva Convention in 1927, the International Institute for the Unification of Private Law in Rome (with which the ICC was cooperating) had been working to draw up a uniform law of arbitration in private disputes which could be adopted universally. During the Lisbon Congress of the ICC in 1951, however, the above plan was abandoned because it was considered that it would be extremely difficult to persuade the governments of the world to adopt a uniform law in this matter.

According to the ICC view, commercial people should be free to make the kind of contract they consider best suited to their individual and special needs and the only grounds on which an arbitration award should be set aside would be:

1. that it was contrary to public policy in the country in which it was sought to be relied on;
2. that the subject-matter of the award was not capable of settlement by arbitration under the laws of the country in which it was sought to be relied on;
3. that the conduct of the arbitration could be shown to have been contrary to the principles of natural justice; and
4. that the arbitral procedure was not in conformity with the rules stipulated by the parties, irrespective of whether these rules conform with those of the national law of the place of arbitration.

In the following pages the Convention is reproduced as approved by the United Nations diplomatic conference on June 10th, 1958, together with the International Chamber of Commerce comments thereon:

COMMISSION ON INTERNATIONAL COMMERCIAL ARBITRATION

Recognition and Enforcement of Foreign Arbitral Awards

Text of Convention
*As approved by the UN Conference on 10 June 1958**

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may

* 35 in favor, none against, with 4 abstentions (Guatemala, Norway, Yugoslavia, U. S.).

also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected their agreement or failing any indication thereon, under the law of the country where the award was made;

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority as referred to in Article V paragraph 1 (e) the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent they become bound by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in Article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;
(b) Accessions in accordance with article IX;
(c) Declarations and notifications under articles I, X, and XI;
(d) The date upon which this Convention enters into force in accordance with article XII;
(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 10th JUNE 1958

I. *Introductory remarks*

There is no doubt that the new convention reflects the ICC's suggestions and recommendations in the most satisfactory manner. These proposals referred, in particular, to the title and scope of the convention and also the provisions that deal with the conditions for the recognition and enforcement of the awards to which the convention applies.

In all these respects the new convention is more favorable to international commercial arbitration than the 1927 Geneva Convention and therefore likely to lead to a greater expansion of international commercial arbitration.

The aim of this short paper is to draw attention to these advantages and in particular to show how the application of the ICC's Rules of Arbitration will be made easier as a result of the reforms introduced by this new convention.

II. *Freedom to choose the law governing the arbitration proceedings*

The first difficulty encountered by the ICC's arbitration under the 1927 Geneva Convention stemmed from the basic principle of that Convention, viz. the automatic application to the arbitration proceedings of the legislation of the country where arbitration took place.

This principle had the effect of severly limiting the freedom of choice of the parties or the ICC's Court of Arbitration regarding the most appropriate place for arbitration in each individual case: any country whose arbitral laws contained provisions that were incompatible with the ICC's Rules of Procedure had of necessity to be ruled out.

The ICC tried for more than 20 years to overcome this disparity between domestic arbitral laws by advocating the international unification of these laws. This reform would have made it possible fully to ensure the ubiquity of the ICC's arbitration by removing all legal obstacles to the application of its rules of procedure.

When it finally became clear that nothing would come of this attempt at legislative unification in the immediate future, the ICC drew up a preliminary draft convention, the one on which the new United Nations Convention is based. Under this draft, the application of national rules of procedure was to be limited to disputes of a purely domestic character. In this way the ICC hoped to remove arbitration proceedings, where international business was concerned, from the realm of all national rules of procedure so as to give the parties absolute freedom to settle procedural matters.

This thorough-going solution was not adopted by the New York Conference. But the ICC has no reason for complaint.

In the first place, the solution adopted is still capable of considerably extending the scope of our arbitration. The convention enables the parties to select a place and to hold the arbitration proceedings there in accordance with a foreign law of their own choosing. In other words, to take a concrete example, if the Court, in a dispute between a Portuguese firm and a French company, had chosen Madrid as the place for arbitration, this choice would have meant the application of Spanish rules of procedure, whereas under the new convention, the parties can perfectly well stipulate that the arbitration proceedings shall be held in Madrid in accordance with the rules of the French code of civil procedure. This obviously represents a considerable advance. Spanish law does not recognize as valid the nomination of the arbitrator or arbitrators by the Court of Arbitration but instead requires that they should be nominated personally by the parties. This consequently prevents the realization of one of the most important aims of the ICC's Court of Arbitration, indeed of all institutional arbitration. On the other hand, the French code of civil procedure allows the parties the greatest freedom in this respect by not placing any obstacle in the way of the application of the ICC's Rules of Arbitration, in the example quoted above.

Furthermore, the solution adopted in New York does pay sufficient heed to the requirements of international commercial arbitration. It is always possible, irrespective of the place chosen for arbitration, for the parties by mutual consent, to substitute for the statutory procedure in force in that country the procedural requirements of another country that are compatible with the Rules—let us say for the sake of argument those of the ICC—which they are willing to accept. The more thorough-going solution originally envisaged by the ICC to free international arbitration not only from the domestic law in question but indeed from all municipal laws, would only have been required in a single case, where no domestic law was compatible with the needs of modern international trade. In actual fact, however, the laws of many countries are perfectly well suited to these needs and do not hamper the working of the ICC's arbitration.

III. *Abolition of the double enforcement order*

In the example of arbitration between the French and Portuguese companies in Spain it was necessary, in order that the successful party, let us say the Portuguese firm, could seek enforcement in France, that the award

had become "final" in Spain. In practice, this condition meant that it was first necessary to file a request with the Spanish courts for an enforcement order which would thereby testify to the final and operative character of the award. This obligation was totally at variance with business needs in view of the fact that in such a case enforcement was not envisaged in Spain whose only connection with the dispute was the more or less fortuitous one arising out of the choice of the arbitrator and the place of arbitration.

This tiresome necessity of a double enforcement order in the country where the award was given and in the country where it was sought to be relied on, is done away with in the new convention, in accordance with the ICC's recommendations, although the ECOSOC experts, when preparing their draft which served as the basis for the Conference, did not think it would be possible to achieve this reform.

IV. *New facilities for the successful party*

No less numerous were the difficulties encountered by a successful party to international arbitration proceedings in the country where the award was to be relied upon.

The party has in particular to furnish proof that the award in question complied with certain specific conditions. It likewise had to contend with a long list of reasons for which enforcement could be refused and which the defaulting party could freely invoke whilst obliging the successful party to prove, where necessary, the non-existence of the reason quoted for refusal.

The reforms proposed by the ICC in this connection were basically designed to secure prima facie recognition of the enforceability of the award. It thus aimed at imposing on the defending party the burden of proving the existence of any grounds for refusal, at the same time the ICC felt that the list of these reasons ought to be considerably reduced.

On this point, which is most important for arbitration practice, the new convention is entirely satisfactory to the ICC; it would not even be an exaggeration to say that the text finally adopted of Articles IV, V and VI which govern this question meet the ICC's wishes even better than the relevant articles in its own draft.

Henceforward it will be sufficient for the claimant merely to supply (a) the text of the arbitration agreement (arbitration clause or submission) and (b) the text of the award (Article IV).

Thus, provided the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon or the recognition or enforcement of the award is not contrary to public policy in that country, the claimant should in principle receive satisfaction.

With regard to the few cases which are still considered to constitute a ground for refusal it is up to the defending party to furnish proof of the existence of one of these grounds (Article V).

This reform can best be described by saying that it is highly improbable that any award given on behalf of the ICC would ever—owing to the supervision exercised in this connection by its Court of Arbitration in accordance with Article 26 of its Rules—be refused recognition or enforcement on any of the grounds given in the complete list under Article V of the New York Convention.

V. *Conclusions*

These, then, are very briefly the main reasons why the ICC should welcome the result of the New York Conference for the Convention offers businessmen the desired new facilities while at the same time making certain reservations designed to safeguard the sovereignty of the States concerned.

As moreover the ICC provided the original inspiration for the reforms

thus achieved it is doubly appropriate that it should take the lead in trying to secure the signature and ratification of the New York Convention by the largest possible number of countries.

The Convention is open for signature until 31st December 1958 (Article VIII) and it will come into force on the 90th day following the date of deposit of the third instrument of ratification or accession.

At the end of the Conference 10 States out of the 45 taking part immediately signed the Convention. As it was however adopted by 35 nations, there is reason to hope that the Convention will soon acquire the universality which was denied the 1927 Geneva Convention.

National Committees are therefore urged to bring all their influence to bear with governments in order to ensure as quickly as possible the signature and ratification of the new Convention. The ICC realizes only too well that a vigorous campaign by business circles can alone persuade governments to take the decision that is expected of them.

IV. CASES AND COMMENTS

EXTRACT FROM JUDGMENT GIVEN BY THE FIRST CIVIL COURT OF THE FEDERAL TRIBUNAL DATED MARCH 12th, 1957, IN "JAQUET VS. CLUB NEUCHATELOIS D'AVIATION"

A. On March 25th, 1953, the Neuchâtel Aero-Club—an association which is regulated by Articles 60 et seq. of the Swiss Civil Code—informed the Zurich Branch of the "Aero-Club Suisse" that they wanted to release publicly a free balloon on May 16th, 1953. On March 31st, 1953, the Zurich Club replied that their balloon "Helvetia" could be used for that purpose. They added the following instructions: "From the passengers you can collect the usual tax of Frs. 200 per person. In addition, the passengers must pay the fee of Frs. 20 for the compulsory balloon-passenger insurance. Normally . . . Helvetia can take three passengers in addition to the pilot, so that you can count on a receipt from taxes of Frs. 600."

The Neuchâtel Club agreed to the conditions for the ascent attached to the letter which, among others, contained the following provisions:

> "The Zurich Balloon Section undertakes:
>
> 3. To furnish the services of a reliable pilot and balloon master.
>
> The Neuchâtel Aero-Club undertakes:
>
> 4. To pay all expenditure relating to the organization and filling on the Neuchâtel field. . . .
> 5. To pay a rent of Frs. 400 for the Balloon Helvetia, as well as the cost of the balloon-passenger insurance, amounting to Frs. 80 (for four persons).
>
> The Neuchâtel Club has the right to rent to fare-paying passengers the three passenger seats available in addition to the pilot's.
>
> The pilot and the balloon master are to supervise and be responsible for the filling operations on the Neuchâtel field. The decision as to whether to take off (weather) belong to the pilot alone."

The Zurich Branch, having been informed by the Neuchâtel Club that it would be difficult to find three paying passengers, on April 28th, 1953, answered as follows: "In addition, we will do our best to find a fare-paying passenger from Zurich or Bern for your flight, in order to help you fill the car."

The Zurich Club appointed one of its members, Frederic Michel, as pilot and concluded an agreement with him regarding the conditions of employment.

B. On May 16th, 1953, the "Helvetia" ascended normally at Neuchâtel under the direction of the pilot, Michel. The present appellant, Charles Jaquet, was among the three passengers on board. One of the passengers had been provided by the Zurich Club and each of them had paid the amount of Frs. 150 to the Neuchâtel Club, which included the insurance premium. Before the take-off, and during the ascent, Michel gave the passengers instructions as to behavior during the landing.

When the balloon landed—near Lauwil (Bâle-Campagne)—the gondola (or car) was upset by the strong wind. Jacquet was hurled to the ground and broke his thigh-bone. He underwent lengthy treatment and now suffers from a permanent invalidity which his doctor evaluates at 20%. The Winterhour Insurance Company, where the collective passenger insurance policy had been taken out, paid him an indemnity of Frs. 6,947.

The Federal Commission of Investigation delivered its findings on February 22nd, 1954. They considered that during the last stage of the flight the pilot had not had enough lest left to control his landing and that, therefore, he had committed a slight fault by taking to little lest at departure time.

C. Charles Jaquet sued the Neuchâtel Aero-Club for damages which he finally fixed at Frs. 29,303, with interest at 5% as of May 16th, 1953. The defendant asked that the claim be rejected.

In a judgment, dated June 4th, 1956, the "Tribunal cantonal" of Neuchâtel rejected the plaintiff's conclusions.

D. Jaquet then appealed to the Federal Tribunal, emphasizing the conclusions which he had submitted to the Cantonal Court. The Neuchâtel Aero-Club asked that the appeal be rejected.

The Law Contained Within the Case

1. A free balloon is an aircraft within the meaning of the Federal Law on Air Navigation of December 21, 1948 (see Art. 51, para. 2 of this Decree, and Art. 1 of the Enforcement Regulation of June 5, 1950). In the case of transportation on a free balloon, the carrier's liability is covered by the Air Transport Regulation of October 3, 1952 (RTA), issued by the Federal Council in conformity with Article 75, para. 1 of the Federal Law on Air Navigation. Under Article 8 (RTA), the carrier is liable in both domestic and international transportation, in conformity with the provisions of the Warsaw Convention of October 12, 1929, and the additional provisions to this regulation. Under Article 17 of the Warsaw Convention "the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations embarking or disembarking." However, under Article 20(1) "the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." The Warsaw Convention does not define the term "carrier" but the transport regulation does so in Article 1, para. f: The carrier is the person who undertakes to carry persons, baggage or cargo on an aircraft.

In the present case, Jaquet suffered damage under conditions envisaged by Article 17 of the Warsaw Convention. Furthermore, it has been established that the transport took place against a payment of Frs. 150 which included the accident insurance premium. The person who accepted him as a passenger is therefore liable for the damage, unless he can exonerate himself by establishing the defense provided under Article 20(1) of the Warsaw Convention.

2.(a) According to the Cantonal Court, the two clubs did not conclude a charter agreement and the Zurich Club must be considered as the carrier.

According to the Court, it was agreed that a balloon should be launched under the responsibility of its pilot, who was to be the sole person authorized to give the order for departure and to determine the number of passengers; moreover, it was the Zurich Club which agreed to carry passengers and, against a payment of Frs. 400, granted to the Neuchâtel Aero-Club the right to supply them with three passengers; finally, the ascent tax, due by those organizing the meeting, was paid by the Zurich Club.

(aa) This last statement is obviously based on error and is substantiated by the defendant's letters of May 6 and 17, 1953; by the letter of May 5, 1953, from the Zurich Club to the pilot, Michel; and by the statement of accounts for the meeting—namely that it was the Neuchâtel Aero-Club which paid the tax of Frs. 115 to the Federal Air Office. Moreover, the defendant recognizes these facts. The contrary statement of the Cantonal judges therefore must be rectified ex officio by virtue of Article 63, Para. 20 J.

(bb) By stating that the Zurich Club had merely granted to the defendant the right to supply passengers, the Cantonal Court did not establish a fact; they had judged the legal significance of the concurrent statements of the parties and determined the subject and consequences of their agreement. It becomes therefore a matter of law on which the Federal Tribunal has competence.

However, the interpretation of the first judges is incompatible with the wishes expressed by the parties. The conditions which the Defense accepted on March 31, 1953, provided for the payment of the sum of Frs. 400 for the balloon. In addition, the Zurich Club stated in a letter dated April 26, 1953, that they would try to supply the Neuchâtel Aero-Club with a passenger for the ascent being organized by the latter club. It cannot therefore be deduced from the agreement concluded between the parties, that the extent of the Defendant's participation was limited to that of supplying passengers for the ascent.

(cc) It does not necessarily follow that, because the take-off was under the control of a pilot who was engaged by the Zurich Club, the Zurich Club must be considered as "carrier" (see above para. b).

B. Whether the Zurich Club or the Neuchâtel Aero-Club must, in this particular case, be considered "the carrier" is the most important question, i.e. the one who undertook to carry Jaquet by aircraft for consideration (Article 1, para. F (RTA) Air Transport Regulations) or, in other words, who concluded the contract of carriage with the appellant.

No mention is made in the Cantonal judgment as to who made the suggestion that Jaquet participate in the ascent but the Cantonal Court does note that the president of the Neuchâtel Aero-Club, in reply to a request from the appellant, Jaquet, told the latter that he was insured. On the other hand, it appears from the facts, as established by the Judges of first instance, that the defendant had the right to take three passengers, that it sought such persons, and that the Zurich Club intervened in order to supply a passenger. Furthermore, it is established that Jaquet paid the Neuchâtel Aero-Club the fare for the trip; additionally, the event was organized by the defendant which paid the tax for the ascent. Under these conditions, it is clear that Jaquet concluded the contract of carriage with the Neuchâtel Aero-Club and not with the Zurich Club. Neither from the records of the Cantonal Court, nor from the circumstances as a whole, does it follow that, by seeking passengers the defendant acted on behalf of the Zurich Club. Therefore, the Neuchâtel Aero-Club must be considered as the carrier.

It is true that the defendant was not the owner of the balloon and that the ascent was organized under the technical control of the pilot, Michel, appointed by the Zurich Club. But this is of no importance. The carrier is not the person who executes the contract of carriage but rather the person

who enters into it on his own behalf. It is not necessary for the carrier to meet his obligations by the use of his own equipment. He may, in fact, resort to the services of a third person, particularly by hiring or chartering an aircraft. This is what the Neuchâtel Aero-Club did. The conditions of March 31, 1953, refer to the hire of the balloon, as do several documents in the file, particularly the statement of accounts for the event and the defendant's letter of September 11, 1953. Consequently, the Zurich Club made an aircraft, and the necessary crew, available to the Neuchâtel Aero-Club for consideration, for a specified flight. Such a contract is one of charter. The fact that the defendant used the services of the Zurich Club to execute the flight did not disturb the former's capacity as carrier vis-a-vis Jaquet.

C. The texts, however, are not unanimous with regard to the person who is liable, vis-a-vis the passenger in the case of charter of aircraft. Some authors (Cuquoz, op. cit.—Le droit privé aérien, p. 92; Juglart, Trairé élémentaire de droit aérien, p. 325, No. 276; contra Riese, Précis de droit aérien, p. 408) consider that it is not the lessee, but the lessor, who assumes liability of the carrier under the Warsaw Convention.

This opinion may have some merit under the Warsaw Convention, which does not define "carrier." But it cannot be accepted within the framework of Swiss national law. In the first place, it would clash with the definition of "carrier" contained in Article 1, para. F RTA., the main object of which is the regulation of liability in air transportation. Accordingly, we must not refuse to apply the legal definition to determine the person liable vis-a-vis the passenger.

Furthermore, the liability established by the Warsaw Convention is of a contractual nature. The liability is not based on the risks peculiar to air navigation, but on the faulty non-execution of the obligations assumed by virtue of the contract of carriage. Therefore, it is in perfect conformity with the general principles of the Swiss civil law that the carrier—according to the meaning given in Article 1 para. f RTA—should be liable for damage due to the imperfect compliance with the contract, even when the aircraft has been chartered. In fact, under Article 101 CO, of the code, the contractual debtor is liable for the acts of persons to whom he has entrusted the execution of his obligations, e.g. sub-contractors. Now "auxiliaires" means not only the persons under the debtor's authority, like the debtor in an employment relationship, but all those to whom the debtor entrusts the performance of his obligation (RO 70 11 220). The lessor and his agents, or servants, are, so to speak, the "auxiliaires" according to this definition.

It follows that, in principle, the Neuchâtel Aero-Club, being the carrier, is liable for the damage suffered by Jaquet by the terms of Article 17 of the Warsaw Convention.

3. According to the provisions of Article 20 of the Warsaw Convention, the carrier is not liable, if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(a) According to Article 101 CO, the pilot, Michel, was the "auxiliaire" of the Neuchâtel Aero-Club, within the meaning of Article 20 of the Warsaw Convention. In fact, by reference to this Convention, the air transport regulation establishes for the national law of Switzerland a contractual liability, the principle of which does not differ from the Swiss common law regulations. Consequently, unless there is some specific provision, or some valid reason for it, the interpretation of this transport regulation must not depart from the rules on obligation contained in the Code. It follows, therefore, that under the air transport regulation, the concept of "préposé" (agent, servant) includes an "auxiliaire." In fact, while the words "ses préposés" of the original French text (Articles 20 and 25 of the Warsaw Convention)

are translated in German by "seine Leute," the air transport regulation—underlining in its Article 10, para. 2, the principle contained in Article 25 of the Warsaw Convention expresses the same idea—"ses préposés" (in the French text) by the German word "Hilfsperson," the very word by which the German text of Article 101 CO designated the "auxiliaire."

(b) In order to escape its liability, the Neuchâtel Aero-Club must prove that the pilot, Michel, has committed no fault. On this point, the Cantonal Court stated that the defendant "could only be made responsible for the damage suffered by Jaquet if he had committed a fault, or if he had been unable to take any other measures than the ones he took. The fact that the pilot, Michel, did not take sufficient lest could not be considered as a fault since this consideration is based on a mere opinion of the Air Office; and further, Michel claims that he had enough lest when he landed and had given the passengers the necessary instructions which would avoid an accident."

This reasoning of the trial judges contains an obvious error of facts: the report to which it refers was not issued by the Federal Air Offices but by the Federal Commission of Investigation, set up by virtue of Arts. 25 and 26 of the Federal Law on Air Navigation, and Arts. 131, 135 of the enforcement regulation. This Commission, presided over by a Federal judge and composed of qualified persons, is quite distinct and independent from the Air Office. The functions of this Commission are not alone confined to the administrative investigation, in fact they may be complemented by calling in experts. The Cantonal court therefore must have realized that the report was issued by this commission. One might ask if they would not have preferred this report to the defense of the pilot whose personal liability could have been involved. But it is not necessary to decide whether the Federal Court may, under Art. 63, para. 2 i.f. OJ, modify the decision on this point, for this decision must be set aside in any case in conformity with Arts. 52 and 64, para. 20J, because its motives are ambiguous and incomplete.

In the first place one does not know how the Cantonal Court allocated the burden of proof. If they have charged Jacquet with the burden of proving the fault of the defendant, or its agents in appeal, then they have broken Art. 20, para. 1 of the Warsaw Convention.

Furthermore, the part of the judgment concerning the amount of lest taken up is ambiguous: one does not know whether, in the opinion of the Cantonal Court, the pilot took enough lest, or whether, for that matter, without this being considered, a fault, he did not. The Neuchâtel Court therefore must clarify this point. Furthermore, the Court in judging this matter overlooked certain elements which may be important. For instance, they did not indicate whether the pilot had taken sufficient care in obtaining information on the meteorological conditions or whether, with more complete information, he might have taken more lest. In addition, they did not say anything about the tightness of the gas-envelope, nor did they say anything about the precautions which Michel should have taken in order to prevent a defect on this point. They will have to correct these omissions. At the same time they could probably review their findings in view of the fact that the report which imputes fault to the pilot was issued by the Federal Commission of Investigation and not by the Federal Air Office.

Finally, while the Neuchâtel judges have found that Michel gave the balloon's passengers the necessary instructions which would have avoided an accident, they did not say what these instructions were, so that it is impossible for the Federal Court to decide whether the pilot has committed a fault in this respect or not. They will also have to decide on the other objections which the appellant made against Michel.

The case must be sent back to the Cantonal Court in order that they

complete their judgment on all these points and decide it anew. If the Court considers that the pilot is guilty of a fault, they will also have to examine whether there was contributory negligence on the part of Jaquet.

TRIBUNAL DE VERSAILLES, FIRST CHAMBER: "DE FRANCESHI-HILLER HELICOPTERS." MARCH 12, 1957—1957 RFDA 276

Facts: On September 19th, 1953, test pilot Bernard Hébert, an employee of the Société Hélicoptair, a French corporation representing Hiller Helicopters in France, presented a helicopter to French military authorities at the aerodrome of Buc. During a 45 degree turn which was rather sharply begun at a height of about 100 ft., the tail rotor detached. The helicopter crashed, and the pilot was killed. His widow sued Hiller Helicopters, the manufacturers, for damages in the amount of 24 million French francs, pretending that the failure was caused by faulty design and faulty material in the tail rotor drive shaft.

The Court: As there were no contractual relations between defendant and deceased, and as the helicopter was not in the keeping of defendant, there is no presumption of liability against defendant (CCiv 1384), and plaintiff must prove a generating default (*faute génératrice*) of defendant. The principle of liability is determined by the law at the place where the default has been committed, and as the helicopter was designed and manufactured in California, the liability of the manufacturer is governed by the law of California. No such default is however proved by plaintiff, quite on the contrary: The deceased took a particular risk by engaging in spectacular evolutions from which he had previously been recommended by his superior to abstain, in addition to the risk which he had accepted by his profession and which arose from the uncertainties of a technique in full evolution.

Remarks: There is no reason why aircraft manufacturer's liability should be exempt from the general conflict of laws rule that delictual liability is determined by the *lex loci delicti commissi.* This rule seems to prevail in most legal systems, and in general the subsumption of aircraft manufacturer's cases will therefore take place without difficulties and as a matter of course (as to the U.S.A., cf. the recent decision in *Prashker v. Beech,* 1957 US & C Av R 247). It will, however, be very interesting to look out for an English decision under the rule laid down in *Phillips v. Eyre* (1870 L.R. 6 Q.B. 1, 28) which combines the lex fori and the lex loci delicti in a rather peculiar way. The distinction, *obiter dictum,* with regard to the risks assumed by deceased is remarkable and might prove useful in other cases: on the one hand, the normal professional risks attached to an activity on a rapidly progressing frontier of modern technology, already high if compared to other professional risks, on the other hand, the additional risk arising out of arbitrary *allotria* performed at this very frontier.—WERNER GULDIMANN (Zurich)